Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

JEAN-RONY JUPTER, A/K/A JEAN R. JUPITER,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE FIRST CIRCUIT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

JEAN-RONY JUPITER
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QUESTIONS PRESENTED

A. Did the United States Court of Appeals commit error otherwise act arbitrarily or capriciously in determining that "exceptional circumstances" did not exist which prevented or otherwise explained my failure to leave pursuant to grant of Voluntary Departure, issued by the Immigration Court on July 29,1998?

B. Are there any other circumstances which would indicate that the United States Court of Appeals did not appropriately exercise its sound discretion to direct the Broad of Immigration appeals to reopen my case?

I. As the First Circuit Court of Appeals opted to focus not on the merits of excludability in my petition, but, rather, on the IJ's decision to deny the motion to reopen, should the excludability be adequately addressed?

II. Should the voluntary departure deadline be equitably tolled?

LIST OF INTERESTED PARTIES

There are no additional interested parties.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Interested Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	2
Statement of the Case	2-8
(a) Course of Proceedings & Disposition of the Case Below	2-5
(b) Statement of Facts	6-8
Reasons for Granting the Writ	9-10
I. Exceptional Circumstance	11-13
Conclusion	14

TABLE OF CITED AUTHORITIES

Cases: *Page*

Makhoul, 387 F.3d at 80; Sousa, 226 F.3d at 31-32; see also 8 U.S.C. § 1252(d)(1).. 1

8 U.S.C. § 1252(d)(1). 2

Matter of Lozada., 19 I. & N. Dec. 637, 639 (BIA)..... 3

857 F.2d 10 (1st Cir. 1988) 3

See INS v. Doherty, 502 U.S. 314, 323 (1992) 4

Carter v. INS, 90 F.3d 14, 16-17 (1st Cir. 1996) 4

8 U.S.C. § 1252(d)(1). 4

Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976) 4

The Homeland Security Act of 2002, Pub. L. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291(a).). 5

Lattab v. Ashcroft, 384 F.3d 8, 13 n.2 (1st Cir. 2004) 5

Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. 105-277, div. A, sec. 101(h), § 901 et seq., 112 Stat. 2681, 2681-538 to –542. 5

8 C.F.R. § 1003.23(b)(4)(i) 5

Matter of LOZADA 19 I and Dec 637 [BIA 1998] 7

Cited Authorities

Cases: *Pages*

Varela v .INS 204 F3rd 1237 (9th Cir. 2000). CF matter of G-Y-R, 23 I and N Dec 181 (BIA 2001) 11

INA section 240 B (d) 11

Batanic v INS 12 F3rd 662, 667 (7th Cir.1993..... 11

Lopez v INS, 184 F3rd 1097 (9th cir.1999) 11

Castillo Perez v INS, 212 F3 rd 518 (9th Cir 2000)..... 11

Valera 204 F3rd at 1240..... 12

USCA Constitutional Amendment 5..... 12

Mario Eduardo Velarde Pacheco, 231 I and N Dec 253 (BIA 2002) 13

204 F3rd 1237, (9th Cir .2000), citing Holmberg v Armbrecht 327 US 393 (1946) 13

TABLE OF APPENDICES

Page

Appendix A – Opinion of the United States Court of Appeals for the First Circuit Dated and Filed February 8, 2005... 1a

Appendix B – Decision of the Board of Immigration Appeals, April 21, 2004..... 11a

Appendix C – Political Asylum application cover letter, February 28, 1998..... 12a

Appendix D – Political Asylum withdrawal and request for Voluntary Departure cover letter, July 22, 1998..... 13a

Appendix E – Motion to Waive Fee and Motion to Reopen with Affidavit, September 25, 1998..... 14a

Appendix F – Decision on Motion to Waive Fee and Motion to Reopen, October 21, 1998..... 18a

Appendix G – Marriage Certificate, August 28, 1999.. 19a

Appendix H – Son's Birth Certificate, May 5, 1999.. 20a

Appendix I – Notice of Approval of Relative Immigrant Visa Petition, December 17, 2002..... 21a

Appendix J – Brief in Support of Appeal to the Immigration Judge's Denial of Motion to Reopen Removal Proceedings and Request for Stay of Removal, August 15, 2003..... 22a

Appendix K – Order of the Immigration Judge re: Brief in Support of Appeal to the Immigration Judge's Denial of Motion to Reopen Removal Proceedings and Request for Stay of Removal, March 10, 2003..... 25a

COMES NOW I, JEAN RONY JUPITER, THE PETITIONER WHO SUBMITS THIS BRIEF IN SUPPORT OF MY CONTENTION THAT THE UNITED STATES COURT OF APPEALS ERRED DENYING MY PETITION FOR JUDICIAL REVIEW, FILED IN MAY 20, 2004. SEE APPENDIX A.

OPINIONS BELOW

The Board of Immigration Appeals decided the case by unpublished written order (Appendix B). The First Circuit Court of Appeals issued an opinion that was not published (Appendix A).

STATEMENT OF JURISDICTION

I, Jean Rony Jupiter, petitioner raise before the Court the possibility that my voluntary departure deadline should be equitably tolled. The First Circuit Court of Appeals lacks jurisdiction to consider this contention. See Makhoul, 387 F.3d at 80; Sousa, 226 F.3d at 31-32; see also 8 U.S.C. § 1252(d)(1).

The First Circuit Court of Appeals entered its decision on February 8, 2005. Initial appeal to the Supreme Court was postmarked April 15, 2005, received April 19, 2005 and failed to comply with the Rules of the Court. The petition in corrected form is now being submitted in timely fashion within 60 days of the date of the reply from the Office of the Clerk of the Supreme Court of the United States.

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1252(d)(1) "A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right."

STATEMENT OF THE CASE

(a) Course Proceedings & Disposition of the Case Below

In 1995, I, a Haitian national, entered the United States and became a resident of the Virgin Islands and applied for asylum. (Appendix C) Two years later, the Immigration and Naturalization Service (INS) instituted a removal proceeding.[1]

One week before the scheduled hearing, the my attorney, Warren M. Williams, informed the immigration court that I wished to withdraw my asylum application and to effect a voluntary departure from the United States within the next four months. (See Appendix D) At the subsequent hearing, I appeared alongside several other similarly situated aliens, each of whom had made an identical proposal. The Immigration Judge (IJ) granted the requests and allowed me to depart voluntarily from the United States on or before November 30, 1998.

I retained a new attorney, Vincent A. Fuller, Jr. On September 25, 1998, my attorney moved to reopen my removal proceeding. In an affidavit filed in support of this motion, my petition claimed that my original lawyer had failed to advise me fully about my rights. (Appendix E)

The IJ denied the motion "without prejudice," noting that I had "failed to comply" with the procedural requirements attendant to the filing of a motion to reopen premised on

ineffectiveness of counsel. (Appendix F) See Matter of Lozada, 19 I. & N. Dec. 637, 639 (BIA) (explaining that an alien moving to reopen on the ground of ineffective assistance of counsel must, inter alia, provide his former attorney with notice and an opportunity to respond), review denied, 857 F.2d 10 (1st Cir. 1988). The denial of the motion to reopen took place on October 21, 1998 (slightly over one month before the voluntary departure deadline). About which, I was *not* notified. Believing my motion still pending, I remained in the United States and not capriciously.

I met my now wife in May of 1998, was engaged in September 1998 and married in August 1999. (Appendix G) Upon my arrival in Atlanta (September 1998) I contacted the INS to notify them of my relocation. In May of 2000, our son was born. (Appendix H)

In 1999, my wife filed an I-130 "immediate relative" petition in an attempt to lay the groundwork for adjusting my status to that of a lawful permanent resident (LPR). If the LPR had no grounds based on the previous decision of the INS, why then did the INS not act or respond until I, after waiting the required 30-month time frame, went into the Atlanta office on what I believed to be a formality to the affirmative conclusion of the LPR. It was not until 2002 that the INS accepted that petition for immediate relative. (Appendix I) It was also at that time, that the INS placed me on an Order of Supervision due to its previous decision in my case, this my first communication on its resolution. I secured counsel and on January 13, 2003, I filed a what I believed to be a just motion to reopen (Appendix J) my removal proceeding and proposed reopening my case in order to permit me to file a change of status application premised upon my marriage. In the body of the motion, my counsel asseverated that exceptional circumstances had prevented me from complying with the voluntary departure deadline. Those circumstances were

twofold: (i) Fuller had never informed me of the denial of my first motion to reopen, and I had assumed that its pendency meant that I should remain in the United States until settled; and (ii) human rights violations in Haiti were sufficiently pervasive to warrant non-enforcement of the removal order. [2]

In a terse handwritten order, the IJ denied the motion. The order limned two grounds: (i) this was my second motion to reopen; and (ii) reopening would be futile because I had overstayed my voluntary departure date and, summarily, was barred from readjusting my status. (Appendix K) Again, circumstance beyond my control predisposed my voluntary departure.

A timely appeal was made to the BIA. In it, my counsel explained the course of circumstance that lead to the resulting overstay. The BIA affirmed without opinion on April 21, 2004. This petition for judicial review followed. (Appendix B)

The abuse of discretion standard governs judicial review of the denial of a motion to reopen, regardless of the substantive claim involved. See INS v. Doherty, 502 U.S. 314, 323 (1992). The First Circuit Court of Appeals focused not on the merits of excludability, but, rather, on the IJ's decision to deny the motion to reopen. Carter v. INS, 90 F.3d 14, 16-17 (1st Cir. 1996). I pray the court examines the merits of excludability see 8 U.S.C. § 1252(d)(1) ("A court may review a final order of removal only if . . . the alien has exhausted all administrative remedies available to the alien as of right.").

It would also seem that Due Process is at issue. The granting of the MTR would have allowed me to be heard on my exceptional circumstance and in denying it the IJ deprived me of the constitutional right to due process. According to the law, there is cognizable liberty or property interest at stake. See Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976). This

cannot be proven it I cannot be heard.

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1. The Homeland Security Act of 2002, Pub. L. 107-296, § 471, 116 Stat. 2135, 2205 (codified as amended at 6 U.S.C. § 291(a)), abolished the INS and transferred many of its duties to the Department of Homeland Security. See Lattab v. Ashcroft, 384 F.3d 8, 13 n.2 (1st Cir. 2004).

2. The motion papers assert that I was entitled to relief under the Haitian Refugee Immigration Fairness Act of 1998 (HRIFA), Pub. L. 105-277, div. A, sec. 101(h), § 901 et seq., 112 Stat. 2681, 2681-538 to -542. Conditions in my native land have changed materially. 8 C.F.R. § 1003.23(b)(4)(i).